

## Defendants,

## COMPLAINT

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1. Plaintiffs American Whitewater and American Rivers, Inc. hereby respectfully file this suit against Defendants Electron Hydro LLC et al. (“Electron”), to challenge its operation of the Electron Hydroelectric Project (“Project”) on the Puyallup River in Washington, because the Project has taken and continues to take Chinook salmon, steelhead trout, and bull trout, all of which are listed as threatened with extinction under the Endangered Species Act (“ESA”).

Jurisdiction.

2. This Court has jurisdiction pursuant to the citizen suit provision of the ESA, 16 U.S.C. § 1540, and because this case involves a federal question. 28 U.S.C. § 1331. On August 31, 2015, Plaintiffs gave Electron notice of their intent to sue under the ESA for operating and maintaining the Project. More than 60 days have elapsed since Electron received this notice. Plaintiffs seek relief authorized by the ESA and the Declaratory Judgment Act. 16 U.S.C. § 1540; 28 U.S.C. §§ 2201-02.

3. Venue is proper in this Court pursuant to 16 U.S.C. § 1540(g)(3)(A) and 28 U.S.C. § 1391(e). Seattle is the appropriate division within this district for this suit. LCR 3(d). Defendants Electron Hydro LLC, Tollhouse Energy Company, and Thom A. Fischer reside in Whatcom County. Plaintiffs American Whitewater and American Rivers have offices in King County.

4. A present and actual controversy exists between the parties to this action.

Parties.

5. Founded in 1954, American Whitewater is a national non-profit organization whose mission is to conserve and restore America's whitewater resources and to enhance opportunities to enjoy them safely. American Whitewater is a membership organization representing a broad diversity of individual whitewater enthusiasts, river conservationists, and more than 100 local paddling club affiliates across America. American Whitewater is a primary advocate for preserving and protecting whitewater rivers throughout the United States, and connects the interests of human-powered recreational river users with ecological and science-based data to achieve the goals within its mission.

6. American Rivers is a national conservation group that protects wild rivers, restores damaged rivers, and conserves clean water for people and nature. Since 1973, American Rivers has protected and restored more than 150,000 miles of rivers through advocacy efforts, on-the-ground projects,

1 and establishment of the annual America's Most Endangered Rivers® campaign.

2 7. Plaintiffs American Whitewater and American Rivers have members and supporters who use  
3 and enjoy Chinook salmon, steelhead trout, and bull trout in the Puyallup River specifically and  
4 Puget Sound generally. These members and supporters include anglers who fish in the Puyallup  
5 River and throughout Puget Sound. These members and supporters include those who have spiritual,  
6 dietary, aesthetic, and scientific interests in Chinook salmon, steelhead trout, and bull trout in the  
7 Puyallup River and Puget Sound.

8 8. Defendant Electron Hydro LLC is a limited liability corporation registered in the State of  
9 Washington that has an ownership interest in the Project.

10 9. Defendant Tollhouse Energy Company is a for-profit corporation incorporated and registered  
11 in the State of Washington that has an ownership interest in the Project.

12 10. Defendant Thom A. Fischer is the Manager of Electron Hydro LLC. Mr. Fischer is the  
13 President, Secretary, Treasurer, and Chairman of the Tollhouse Energy Company. Mr. Fischer is an  
14 investor in the Project. Mr. Fischer supervises and manages Project staff.

15 Facts.

16 11. The Puyallup River originates in glaciers along the slopes of Mount Rainier in the Cascade  
17 Mountains in Washington state. The Puyallup River flows roughly 65 miles to Commencement Bay  
18 in Puget Sound. The Puyallup River watershed forms the third largest tributary to Puget Sound. The  
19 Puyallup River watershed encompasses approximately 665,000 acres (approx 1000 mi<sup>2</sup>). The  
20 Puyallup River flows through lands owned by the Puyallup Tribe. Puyallup tribal members have  
21 lived in the area since time immemorial. The Puyallup Tribe serves as co-managers of the fishery in  
22 the Puyallup River.

23 12. Eight anadromous fish populations inhabit the Puyallup River watershed. The anadromous  
24 fish populations that inhabit the Puyallup River watershed include Chinook, coho, chum, pink, and  
25 sockeye salmon, and steelhead trout, bull trout, and sea-run cutthroat trout. Fluvial/resident bull trout  
26 populations inhabit the Puyallup River watershed.

27 13. Historically, the Puyallup River watershed supported approximately 42,000 Chinook salmon  
28 (*Oncorhynchus tshawytscha*). In 1999, the National Marine Fisheries Service ("NMFS") listed

1 Chinook salmon in Puget Sound, including in the Puyallup River, as threatened with extinction  
2 under the ESA. In 2007, NMFS adopted a Recovery Plan for Chinook. As of 2007, escapement of  
3 Chinook in the Puyallup River watershed (including early/spring returns to the White River) was  
4 estimated to be 1,300 fish. Chinook smolts and juveniles in the Puyallup River outmigrate  
5 throughout the year, with peak outmigration in May to June.

6 14. Historically, the Puyallup River watershed supported approximately 6,000 steelhead trout  
7 (*Oncorhynchus mykiss*). In 2007, NMFS listed steelhead trout in Puget Sound, including in the  
8 Puyallup River, as threatened with extinction under the ESA. Steelhead trout typically spend two  
9 years in the Puyallup River or its tributaries before out-migrating. Steelhead trout from the Puyallup  
10 River may spend one to four years in the ocean or Puget Sound. Steelhead trout in the Puyallup  
11 River out-migrate throughout the year, with peak out-migration occurring from March to July. The  
12 current steelhead population in the Puyallup River watershed is approximately 750 adults.

13 15. Historically, the Puyallup River watershed supported bull trout (*Salvelinus confluentus*). In  
14 1999, the U.S. Fish and Wildlife Service ("FWS") listed the populations of bull trout in the  
15 Coastal/Puget Sound region in Washington, including in the Puyallup River, as threatened with  
16 extinction under the ESA. Bull trout populations in the Coastal/Puget Sound region in Washington  
17 include fluvial/resident bull trout and an anadromous form of bull trout. In the Coastal/Puget Sound  
18 region, the Puyallup River is one of eight "core areas" for bull trout. A local population of bull trout  
19 exists in the upper Puyallup River. Bull trout in the Puyallup River migrate throughout the river  
20 throughout the year. In 2004, the Service issued a draft Recovery Plan for the Coastal/Puget Sound  
21 bull trout. The abundance target for bull trout in the Puyallup River is 1,000 adults. Currently, the  
22 bull trout population in the Puyallup River totals fewer than 100 adults.

23 16. Puget Sound Power & Light Company began building the Project in 1902 and finished it in  
24 1904. The Project is located on the Puyallup River in the foothills of Mount Rainier, about 42 miles  
25 southeast of Seattle, in Pierce County.

26 17. The Project includes a timber crib diversion dam at river mile 41.7. The gradient of the  
27 Puyallup River immediately above the diversion dam is approximately two percent. The diversion  
28 dam is approximately ten feet high and has a crest length of approximately 200 feet. The diversion

1 dam can divert up to 400 cubic feet per second (“cfs”) of water.

2 18. When the diversion dam was built, it did not include and was not accompanied by facilities  
3 that would allow Chinook salmon or steelhead or bull trout to migrate above it. Historically, the  
4 diversion dam blocked fish from accessing approximately 26 miles of habitat in the mainstem  
5 Puyallup River and 10 miles in its tributaries. Beginning in 1997, the Puyallup Tribe outplanted  
6 Chinook salmon into acclimation ponds upriver from the diversion dam. These outplanted fish  
7 spawned and their smolts outmigrated, returning as adults 3-5 years later. In 2000, a roughly 215-  
8 foot-long fish ladder was built alongside the diversion dam. Currently, Chinook salmon and  
9 steelhead and bull trout use the ladder and migrate upstream of the diversion dam, and spawn in  
10 areas above the dam. However, fish are unable to use the ladder when it fills with sediment or is  
11 otherwise obstructed.

12 19. The diversion dam has spill control gates. The diversion dam can divert water through an  
13 approximately 62.5-foot wide intake into a wooden flume. The intake has a control gate that can be  
14 shut to prevent water from entering the flume. The diversion dam diverts a mean annual amount of  
15 350 cubic feet per second (“cfs”) of water. The mean annual flow of the Puyallup at the diversion  
16 dam is 527 cfs of water. The intake is not screened to prevent fish from entering the flume.

17 20. The flume is approximately 10.1 miles long. Roughly four miles downslope from the  
18 diversion dam, the flume opens into a settling basin. The settling basin is called “Lizard Lake.”  
19 Electron periodically dredges the settling basin to remove sand and silt. Electron pushes the sand and  
20 silt over the bank of the settling basin and on to the slope downward to the river.

21 21. The flume ultimately empties into a forebay. The forebay is approximately 20 acres in size.  
22 The forebay is at an elevation of 1500 feet. The forebay is at river mile 31.2.

23 22. When the forebay is filled with water, cutthroat trout reside in forebay. Cutthroat trout  
24 residing in the forebay prey on Chinook salmon smolts. Cutthroat trout residing in the forebay prey  
25 on steelhead trout smolts. Cutthroat trout residing in the forebay prey on bull trout smolts. When the  
26 forebay is filled with water, rainbow trout reside in the forebay. Rainbow trout residing in the  
27 forebay prey on steelhead trout smolts. Rainbow trout residing in the forebay prey on Chinook  
28 salmon smolts. Rainbow trout residing in the forebay prey on bull trout smolts.

23. Electron maintains and operates a fish trap in the forebay. Electron periodically traps and removes Chinook salmon from the forebay. Electron periodically traps and removes steelhead trout from the forebay. Electron periodically traps and removes bull trout from the forebay.

24. Periodically, Electron drains the forebay. Electron drains the forebay to remove sediment and debris from the debris racks at the entrance to the penstocks. Electron drains the forebay to remove sediment and debris from the bed of the forebay. When Electron drains the forebay, it captures Chinook salmon from the forebay. When Electron drains the forebay, it captures steelhead trout from the forebay. When Electron drains the forebay, it captures bull trout from the forebay. When Electron drains the forebay, Chinook salmon, steelhead trout, or bull trout are killed.

25. Four penstocks convey water from the forebay into a powerhouse at an elevation of 667 feet. Each of the penstocks is covered by a trash rack of steel bars spaced roughly one inch apart. Chinook salmon pass through the trash rack and become entrained in the penstocks or turbines. Steelhead trout pass through the trash rack and become entrained in the penstocks or turbines. Bull trout pass through the trash rack and become entrained in the penstocks or turbines.

26. Puget Sound Energy owned the Project until November 14, 2014, when it sold the Project to Thom A. Fischer. Before it sold the Project, Puget Sound Energy discussed with NMFS staff the development of a Habitat Conservation Plan under Section 10 of the ESA to permit incidental take of ESA-listed fish caused by the Project. As late as 2008, Puget Sound Energy began a draft Habitat Conservation Plan for the Project. In 2011, Puget Sound Energy suspended the effort to draft a Habitat Conservation Plan for the Project before the Plan was approved. In 2013, Thom A. Fischer met with NMFS staff, anticipating purchase of the Project, to discuss effects of the Project on ESA-listed fish. On November 14, 2014, Electron bought the Project from Puget Sound & Energy. On December 4, 2014, NMFS wrote Thom A. Fischer: "The Electron project kills and harms ESA-listed Chinook salmon and steelhead." NMFS wrote: "We expect you will agree that the project needs to soon implement measures to avoid or greatly minimize ongoing take."

27. Electron does not possess a federal permit or other federal authorization[s] that would allow it to "take" Chinook salmon or steelhead trout or bull trout by diverting the fish into the intake.

Electron does not possess a federal permit or other federal authorization[s] that would allow it to

“take” Chinook salmon or steelhead trout by collecting or capturing them in the forebay. Electron does not possess a federal permit or other federal authorization[s] that would allow it to “take” Chinook salmon or steelhead trout or bull trout that pass through the trash rack into the penstocks and turbines.

#### Claims for Relief.

##### Count One: Violation of the Endangered Species Act.

28. Plaintiffs reallege all previous paragraphs.

29. Section 9 of the ESA prohibits any person from taking an endangered species. 16 U.S.C. § 1538(a)(1)(B). NMFS has extended the take prohibition to Chinook salmon and steelhead trout as species listed as threatened with extinction. 50 C.F.R. § 223.203(a). FWS has extended the take prohibition to bull trout as a species listed as threatened with extinction. 50 C.F.R. § 17.31(a). The ESA defines “take” to mean “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). Each of these verbs has independent meaning. The ESA defines a “person” to include “an individual, corporation, partnership, trust association, or any other private entity . . . .” 16 U.S.C. § 1532(13). Electron has violated, is violating, and will continue to violate Section 9 of the ESA, by illegally causing or committing illegal “take” of Chinook salmon, steelhead trout, and bull trout, through its ownership, maintenance, and operations of the Project.

#### Relief Requested.

1. Declare that Electron has violated the ESA as alleged herein;
2. Order Electron to obtain immunity from take liability from NMFS and FWS;
3. Order Electron to cease diverting water from the Puyallup River in the period before it obtains take immunity from NMFS and FWS;
4. Award Plaintiffs their reasonable attorneys’ fees and costs under the ESA;
5. Grant such other relief as the Court deems necessary and proper.

Dated: January 12, 2016.

Respectfully submitted,

s/ Andrea K. Rodgers  
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